

3 August 2016

Mr Sashi Balaraman
Economic Advisor to the Treasurer
Department of Treasury and Finance
1 Treasury Place
East Melbourne VIC 3002

By email: sashi.balaraman@minstaff.vic.gov.au

Dear Mr Balaraman

State Revenue Office treatment of Land Use Entitlements in alpine resorts

The Law Institute of Victoria (LIV) writes to express concern regarding the recent treatment by the State Revenue Office (SRO) of Land Use Entitlements in alpine resorts where stamp duty has been imposed, and backdated with penalties, notwithstanding:

- there has been no change in beneficial ownership of property; and
- the party liable for duty has acted at the direction of a government entity.

The LIV understands from its member practitioners involved in alpine resort transactions that this concern is shared by the Resort Management Boards of Mt Buller, Mt Hotham and Falls Creek, as well as other stakeholders in all resorts.

Background

All land in Victorian alpine resorts is crown land. Under provisions of the *Alpine Resorts (Management) Act 1997* (Vic) and the *Crown Land (Reserves) Act 1978* (Vic) each resort is managed by a Board. The Boards carry out their functions and powers on behalf of the Crown. Importantly, under s36 of the *Alpine Resorts (Management) Act 1997* (Vic), the Boards are required to comply with directions or guidelines from the Minister.

The development of land within an alpine resort must be treated in accordance with the Alpine Resorts Leasing Policy Implementation Details (Alpine Leasing Policy) as approved by the relevant Minister on 24 October 2002. The Alpine Leasing Policy, at clause 14.1 directs that, "*In the case of development involving sub-lessees, the preferred approach of a company share arrangement that provides that each unit holder has a share in the Lessee Company shall continue to be used....Until a statutory process enabling strata leasing to take place is considered,.....the current process will need to remain.*"

Consistent with clause 14.1 of the Alpine Leasing Policy the ministerial approved alpine lease adopted and applied by all Resort Management Boards provides at clause 13.3(f) that the Board will not unreasonably withhold consent to the grant of a sublease so long as the lessee provides evidence that the sub-lessee will be a shareholder of the Lessee Company.

The company shareholding in conjunction with a sublease is, for the purpose of the *Duties Act 2000* (Vic), known as a Land Use Entitlement (LUE). Since May 2004, the sale or transfer of a LUE is a dutiable transaction. There is no question of duty being paid on the sale or transfer of a LUE.

The *Subdivision Act 1988 (Vic)* and *Owners Corporations Act 2006 (Vic)* do not apply to Crown land and at present, there are no suitable strata style arrangements for the registration of interests on Crown land. To overcome this, the ministerial directed policy has been to have a nominee holding company take a head lease, with a constitution whereby shares in the company entitle the shareholder to a sublease of identified space within a site. The shareholding enables the stakeholder to participate in management of the site in the same manner as an owners corporation.

If an owner of freehold land subdivides the site, there is no duty applied to the issue of new titles for the various lots when a subdivision is registered.

In an alpine resort circumstance, under Crown Land, the subdivision takes place by virtue of the appointment of a nominee lessee company and the issue of shares in that nominee company. A subdivision plan is prepared by a surveyor showing the sublease areas or lots in a similar manner to a subdivision plan of non-Crown land.

That process takes place at the outset of a development and all shares are held and controlled by the developer entity. The process is put in place at the direction of the Boards and in accordance with Alpine Leasing Policy.

The developer entity is usually the old lessee owner of the site. That party remains the beneficial owner of the site by virtue of holding all shares in the new nominee company. There is no change of beneficial ownership unless and until it sells sublease interests. If the developer entity has purchased the head lease interest in the site, it will have paid stamp duty on the acquisition of the leasehold land.

Issue

The LIV understands from its members involved in alpine lease transactions that in a recent matter involving General (Site 1A) Pty Ltd at Mt Hotham, the SRO has adopted an apparently unfair interpretation of the LUE provisions (s103A of the *Duties Act 2000 (Vic)*), and has applied stamp duty to the creation of LUE in the nominee company, notwithstanding that there has been no sale or transfer of a LUE.

It appears that the SRO is retrospectively applying stamp duty to the issue of shares in the nominee company, backdated to 2011, meaning that the original owner, who continues to hold beneficial ownership of the site and assets, is being charged with payment of stamp duty because it complied with the requirement and direction of another government body.

We make no direct submission on the assessment in the General (Site 1A), as we understand that matter is pending an appeal.

More generally, we note that our members advised that that the SRO may have adopted a different interpretation in other comparable transactions.

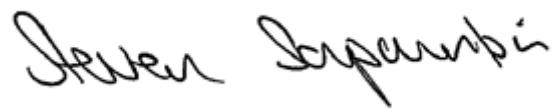
Our members are concerned that if the decision and approach adopted by the SRO in the General (Site 1A) matter is applied, it will have a far reaching impact on every development in Victorian resorts dating back to 2004. As the decision is presently impacting development in the resorts, the LIV is anxious for clarification regarding this issue.

The LIV submits that the interpretation adopted regarding General (Site 1A) is unfair, unintended and, if adopted by the SRO in all such transactions, will have a dramatic impact on dealings and development within the Resorts, both past and present. The LIV is of the firm view that the initial structuring of a LUE should be exempted in order to avoid unjust and unfair outcomes. It is only when a sale or transfer of a LUE arises that duty should be payable.

The LIV would welcome the opportunity to meet with you to discuss the above issue and its proposal.

If you would like to discuss the matters raised in the submission, please do not hesitate to contact me or Karen Cheng, Rebekah Farrell or Barton Wu, Property and Environmental Law Section Lawyers at the LIV, at kcheng@liv.asn.au, rfarrell@liv.asn.au or bwu@liv.asn.au.

Yours sincerely

A handwritten signature in black ink that reads "Steven Sapountsis". The signature is written in a cursive, flowing style.

Steven Sapountsis
President
Law Institute of Victoria